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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

AUSTIN MILLER STATLER, JR.,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. 479

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Fifth Circuit.

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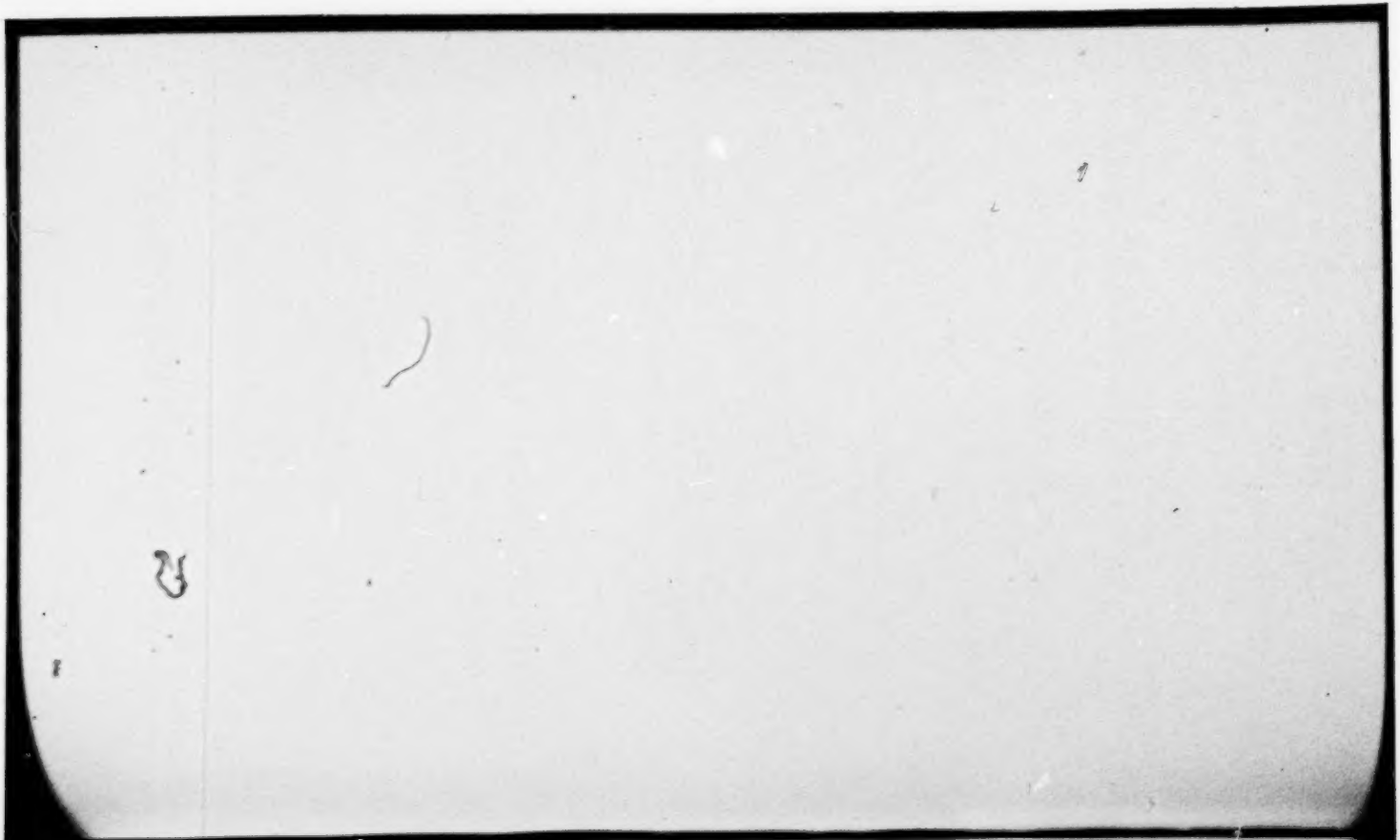

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347), as amended, the Act of Congress of March 8, 1934, Rule 11 of the Rules of Practice and Procedure promulgated by this Court May 7, 1934, and Rule 37 (b) of the new Rules of Criminal Procedure, effective March 21, 1946.

The transcript of record in this case, including the proceedings in the Circuit Court of Appeals, has been filed herein in accordance with Rule 38 of this Court.

II.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner was convicted in the United States District Court at Birmingham, Alabama, under Counts I, II and III of an indictment, returned in six counts, charging conspiracy to violate the provisions of the National Stolen Property Act and substantive violations of that Act (18 U. S. C. A., Sections 415, 416 and 418a). A prison term of five years, the sentences to run concurrently, was imposed under each Count (R. 32, 33).

The indictment was returned against six persons. Four of these plead guilty (R. 144, 233, 523). Petitioner and one Thomas Jackson Matthews plead not guilty (R. 25-28) and were tried together. Petitioner believes that the conduct of the joint trial, and for reasons hereinafter stated, violated rights guaranteed to him by the due process clause of the 5th Amendment and the confrontation clause of the 6th Amendment to the Federal Constitution.

Prior to the trial, petitioner made the following motion for a severance:

> "In this cause comes the defendant, Austin Miller Statler, Jr., and moves the Court to grant him a severance or a separate trial from his co-defendant and as grounds of said motion states and shows to the Court as follows: to-wit:
>
> (1) All his co-defendants herein except Thomas Jackson Matthews have heretofore filed pleas of guilty in this cause and Matthews testified as a witness for the Government before the grand jury.
>
> (2) Defendant is advised that all his co-defendants have made statements to investigators or representatives of the Federal Bureau of Investigation and he is

informed that some of these statements recite alleged facts and circumstances of an incriminating nature against this defendant. He is further advised that some, if not all of his co-defendants, have previous criminal records but he is not advised as to whether such records are shown in the statements made by his co-defendants to Federal investigators.

(3) Under the circumstances above stated the reading of incriminating statements made by his co-defendants, none of these statements having been made in his presence, would necessarily be prejudicial to his right to a fair and impartial trial. This would be especially true in case such statements, made by parties with a previous criminal record that would tend to impeach or discredit their testimony, omit any reference to previous convictions and the party making such a statement was not introduced as a witness in the case.

A reading of the statement made by his co-defendants or any of them tending to incriminate this defendant and particularly in case of the reading of such a statement, made by a party theretofore convicted of a crime, would have the effect of getting before the jury matters concerning which the defendant could not cross-examine the party making the statement, and a prejudice resulting therefrom could not be cured or removed by any instruction given by the Court.

For the reasons aforesaid, defendant prays that he be granted a separate trial from his co-defendants or any of them" (R. 21, 22).

The only testimony of sworn witnesses, introduced at the trial, which implicated petitioner in the transactions involved in the indictment, was given by Lonnie Neal and James Edward Sparks, two of the so-called accomplices who plead guilty to one or more of the several counts of the indictment (R. 144, 233).

Each of these had a criminal record and there are other circumstances, aside from such records and the fact that they were accomplices, which, as conceived by petitioner, are so destructive of the probative value of their testimony as to make it entirely inadequate to support a verdict of guilt.[1]

Matthews plead not guilty but his defense was purely formal. He did not testify at the trial, but did testify as a Government witness before the grand jury, which returned the indictment. He had also made a written statement to agents for the Federal Bureau of Investigation. This statement was made at the instance and in the presence of his attorney, who called F. B. I. Agents and had them come to his office where the statement was made (R. 397).

Matthews had been associated with Neal in some of the latter's criminal enterprises (R. 145) and himself had a previous criminal record, having been convicted and sentenced by an Arkansas State Court on two charges of highway robbery (R. 568, 571).

Matthews' criminal record, his association in criminal enterprises with Neal, his testimony as a government witness before the grand jury, and the contents of his statement to the F. B. I. Agents, given in the office of his attorney, were known in advance of the trial by the United States Attorney who prosecuted the case (R. 527-530, 568-571), but not disclosed to the court when the motion for a separate trial was made (R. 21-23).

Matthews' statement, given the F. B. I. Agents, as aforesaid, omitted any reference to his previous criminal record and made but little mention of his part in the crimes alleged in the indictment, in this respect adding nothing new to the facts theretofore proven by other testimony. It

1 These circumstances will hereinafter be briefly stated.

was replete, however, with incriminatory matters involving petitioner in the crimes charged and in other criminal activities.[2]

When this statement was offered in evidence counsel for petitioner requested that the references therein to petitioner be eliminated. This the court declined to do, but, on the ground that the conspiracy was over when the statement was made, instructed the jury that the statement was not binding on petitioner.[3] **This cautionary instruction was repeated in the court's general charge, but in the charge he also told the jury that Matthews' statement "corroborates certainly to some extent the statement of Sparks and Neal"** (R. 514, 515). Neal and Sparks, directly contradicted by petitioner and others on many material matters, were, as heretofore stated, the only witnesses who implicated petitioner in the transactions involved in the indictment.

In his statement Matthews asserted, among other things, that petitioner had sought his aid in getting "connections in the whiskey racket" (R. 394). This assertion in the statement of Matthews is the sole basis suggested by the record for the cross-examination of character witnesses for petitioner, examined out of turn, in the following, among other, particulars:

> (a) Asking J. R. Pennel, a character witness for petitioner, if he knew petitioner was a gambler, whether the witness had gambled with him or whether

2 Matthews' statement, admitted in evidence over the objection and exception of petitioner (R. 392), is set out in full in the appendix.

3 "I have already told you, gentlemen, now this statement is made by the Defendant Matthews, and it was made after these parties had been arrested, and after any conspiracy would be over. The conspiracy would be at an end at that time, and this statement would not be binding on the Defendant Statler, and is not to be considered under any circumstances by you as any evidence against the Defendant Statler. Whatever is in this statement is only evidence as against the Defendant Matthews" (R. 392).

he knew if he had gambled with anyone else (R. 97, 98).

(b) Asking Walter Isley, another character witness for petitioner, if he sold whiskey at his drug store in Memphis, if he had ever purchased any whiskey from petitioner or had ever gambled with him (R. 102).

(c) Asking petitioner if he did not hire a lawyer for Matthews in Memphis, if he did not know that Matthews intended to enter a plea of guilty in the case and asking him how much he had paid Mr. McGuire, Attorney for Matthews, and whether or not he had paid Matthews anything (R. 480, 481).

During his argument to the jury, the United States Attorney made this reference to members of the petitioner's family, some of whom had testified as witnesses: "His family are here to impress you how dignified and honorable he is." Objection to this argument was overruled (R. 501, 502).

The actual, if not the planned, unfairness of the Government in the use made of Matthews' statement, a prejudicial use clearly indicated by the motion for a severance, was again brought to the attention of the court in the second and third grounds of petitioner's motion for a new trial, to-wit:

"2. The prejudicial consequence of the joint trial of the defendants Statler and Matthews was such as to deprive the former of his constitutional rights to a trial upon the law and the evidence uninfluenced by external consideration.

"In his written motion for a severance, defendant Statler pointed out the probable consequences of a joint trial, and reference is here made to that motion for the contents thereof. When it was presented to

the Court, Government counsel knew that Matthews had made a written statement or confession incriminating defendant Statler which they intended to offer in evidence, that Matthews had testified as a witness for the Government before the grand jury which returned the indictment in this case, that he had a previous criminal record, including convictions for robbery and larceny which defendant Statler could not get before the jury unless Matthews testified as a witness, and they also knew or should have known that it was highly improbable that Matthews would testify at the trial of the case.

"3. The Court permitted to be read to the jury the statement of Matthews which contained many matters incriminating the defendant Statler, and this statement was so highly prejudicial to Statler that no instruction to the jury that it could only be considered as evidence against Matthews would remove the impression it was calculated to make upon the minds of the jurors. If matters extrinsic to the statement itself may be considered, the defendant Statler will offer evidence on the hearing of this motion to show that immediately after retiring to the jury room, the jury sent a message by the officer-in-charge, requesting this statement but the officer was informed by Court officials that it could not be sent to the jury room because the statement itself, while read to the jury, was not filed as a document in the case" (R. 565, 566).

These grounds of the motion, established by undisputed evidence heard in support of the motion for a new trial and admissions of counsel for the Government, were overruled and exceptions taken (R. 527-530, 532, 554-557, 568-571).

THE FACTS.

Pursuant to a directive of the War Labor Board, the Fisher-Memphis Aircraft Division of General Motors Corporation issued retroactive pay checks to employees and former employees in the total amount of $3,800,000.00 (R. 45-47).

The sixty-two checks involved in the indictment were part of the approximately 25,000 checks that were issued to employees and former employees in pursuance of the directive and were taken from the office of the Fisher-Memphis Aircraft Division some time between the date of issuance, November 16, 1945, and the date they were due to be cancelled if not delivered to the employees entitled to receive them, January 9, 1946 (R. 87, 88, 79, 82). The record does not show when, how or by whom the checks were removed from the files of the Fisher establishment. Petitioner was one of many employees who had access to the checks but numerous other employees had equal and greater opportunity than petitioner to have removed the checks without detection (R. 110, 111, 128, 129, 83, 410, 411, 456).

(1) The only incriminating evidence against petitioner was given by two so-called accomplices, Claude Lonnie Neal and James Edward Sparks. Neal was an unsavory character, engaged in liquor and gambling activities and, in addition to conviction in the state court at Greenwood, Mississippi, for voluntary manslaughter, had been convicted in the Federal Court for violations of the liquor laws and for white slavery (R. 190, 223, 442, 443). James Edward Sparks, an associate and employee of Neal, admitted that he had perjured himself in testifying as a Government witness in removal proceedings against petitioner in this case (R. 318).

(2) The testimony of each of these accomplices was inconsistent and self-contradictory, and there was also an irreconcilable conflict in the evidence given by them on most points about which they testified, including the agreed basis of distributing the proceeds of the checks handled, the share of the proceeds received by each, and as to which of them received the checks, each testifying that the checks were obtained by the other and not in his presence (R. 150, 200, 244, 246, 298, 299).

(3) The testimony of these witnesses that petitioner delivered the checks to one or the other of them at Sardis, Mississippi, on Friday, January 11, 1946 (R. 161, 299), was impeached by competent, credible testimony establishing an alibi; this testimony included the verified attendance record of petitioner at the Fisher plant (R. 133-140, 458, 459).

(4) It appears without dispute in the record that Neal and James Edward Sparks transported the stolen checks from Greenwood, Mississippi, to Guntersville, Alabama, that James Edward Sparks endorsed the names of the payees thereon prior to such transportation, that the checks were cashed or deposited in Alabama banks by Buster Sparks and Julian Ferrell Sparks, and that the proceeds were distributed among them without any part being paid either to petitioner or Matthews. Neal and James Edward Sparks received $6700.00 of the $8700.00 proceeds from the checks (R. 201, 250-253, 274, 275, 281-286, 299, 341, 344, 346).

(5) Neal planned the procedure followed in handling the checks and controlled the distribution of their proceeds (R. 300, 341). In dealing with his Alabama accomplices, Buster Sparks and Julian Ferrell Sparks, Neal represented that he had an uncle who was employed at the Fisher plant, that he had gotten the checks from him,

and that this uncle would take care of them, or that in substance (R. 164, 254). Neal did have a relative working for the Fisher plant (R. 206, 207).

OPINION OF THE CIRCUIT COURT OF APPEALS.

Upon the issues of law and fact presented for its consideration, the Circuit Court of Appeals for the Fifth Circuit rendered the following per curiam decision:

> "There is abundant evidence to support the verdict of the jury as to the guilt of both defendants. We find no reversible error in the record, and the judgments are Affirmed."

QUESTIONS PRESENTED.

(1) Whether or not the trial court abused its discretion in overruling the motion for a severance and in refusing to grant a new trial.

(2) Whether or not the record discloses an actual if not a planned invasion by the Government of rights guaranteed petitioner by the due process clause of the Fifth Amendment and the confrontation clause of the Sixth Amendment to the Constitution of the United States.

(3) Whether the trial court violated the rights of petitioner under the Sixth Amendment to the Federal Constitution when he instructed the jury that the statement of petitioner's co-defendant Matthews, who did not testify as a witness, admittedly incompetent against petitioner, could be considered as corroboration of the testimony given by two alleged accomplices, this being the only testimony which connected petitioner with the crime charged in the indictment.

(4) Whether or not there were facts and circumstances, apart from the fact that they were accomplices, which so

thoroughly discredited the uncorroborated testimony of the two accomplices as to destroy its probative value as a matter of law.

Petitioner, instead of filing a brief in support of his contention, will state in sufficient detail the facts and authorities relied upon to sustain his contention that the record presents a case which justifies a review of the judgment of the Circuit Court of Appeals for the Fifth Circuit by this Court.

REASONS WHY WRIT SHOULD BE GRANTED.

I.

The Record Herein Shows a Substantial Violation of Rights of Petitioner Protected by the Fifth and Sixth Amendments to the Federal Constitution.

The record affirmatively establishes that the joint trial, resulting in the reading of Matthews' statement to the jury, was an infringement of petitioner's constitutional right to a fair and impartial trial, for which the Circuit Court of Appeals should have applied corrective processes.

In so contending, we do not infringe upon the well-established rule that the matter of severance is one within the discretion of the trial court and ordinarily not subject to review. **Ball v. United States**, 163 U. S. 662, 672, 41 L. Ed. 300, 303. "This discretion, however, like any other vested in the trial court, is, if abused, subject to review and correction." **United States v. Haupt**, 7th Cir., 136 F. 2d 661, 662.

The motion for a severance pointed out a situation that would probably develop during the trial that would necessarily be prejudicial to petitioner but it is immaterial whether the court erred in overruling the motion at the

time it was made. Had the Government disclosed to the court its intention to introduce a statement made by petitioner's co-defendant Matthews, whose counsel cooperated with an FBI agent in the preparation of the statement, that it intended to introduce this statement regardless of whether Matthews testified as a witness, that the statement omitted any reference to the previous criminal record of Matthews then known to the Government, that Matthews had testified as a witness for the Government before the grand jury and that the statement was of such a character as to make it improbable that the impression it was calculated to make upon the jury could be removed by instructions limiting its effect to Matthews, it would have been an abuse of discretion for the court to deny the application for a separate trial. But it is immaterial to determine whether the trial court abused its discretion in overruling the motion for a severance. "When presented again in the motion for a new trial when all of these facts and circumstances were known to the court, it was likewise an abuse of discretion to overrule such motion and thus refuse to remedy this prejudicial procedure." **United States v. Haupt**, 7th Cir., 136 F. 2d 661, 673, 674; **Hale v. United States**, 8th Cir., 25 F. 2d 430, 438, 439; **People v. Feolo**, 282 N. Y. 276, 26 N. E. 2d 256, 258, 259.

The language used by the New York Court of Appeals in **People v. Feolo** applies with peculiar force to the situation disclosed by the record in the instant case, and we quote therefrom as follows:

> "When defendants are jointly indicted, the question whether there should be separate trials is addressed primarily to the practical good judgment of a trial judge. In the ordinary case, a ruling directing a joint trial will be on the safe side, though confessions or admissions made by one defendant will not be binding on another. See People v. Doran, 246 N. Y.

409, 159 N. E. 379; People v. Snyder, 246 N. Y. 491, 159 N. E. 408. The point at which discretion ends and severance becomes a duty is at times hard to fix. People v. Fisher, 249 N. Y. 419, 164 N. E. 336. Here the duty to sever was clear before this trial began, though that is not a controlling consideration now. In People v. Fisher, supra, we said: 'A retrospective view by an appellate court may reveal injustice or impairment of substantial right unseen at the beginning. In a case where, without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed. One who makes no confession must be found guilty, if at all, only on proof independent of a confession by a codefendant,' 249 N. Y., at pages 427, 428, 164 N. E. at page 339. To us it is here plain that without the confessions of Summerfeld, conviction of the other three defendants would have been far from a certainty. On this record, we cannot say, 'Cast out the confessions, and the result would need to be the same.' People v. Fisher, supra, 249 N. Y. at page 426, 164 N. E. at page 338. Whether Funicello was an accomplice was a question for the jury on any test of that status. His story of antecedent association with Feolo did not go wholly uncontradicted.

"True, the jury was charged that Summerfeld's confessions were not valid evidence of the guilt of any of his three codefendants. But the jury was also charged that those confessions were to be considered by them 'on the question of whether Funicello was an accomplice or not, because Summerfeld has testified, at least, he in his statement stated that Funicello was not an accomplice.' This error makes inadmissible any

argument that the confessions of Summerfeld could not have been weighed by the jury against Feolo, Mastrone or Brabson."

When Matthews' statement was introduced in evidence he had not testified and there was no reason to believe he would testify. So far as he was concerned, the statement added little or nothing to the evidence of his guilt which he had not then disputed and did not thereafter dispute. At any rate, it could have been deleted of the references to petitioner and thereby have been restricted in fact rather than in theory to Matthews. Cases frequently arise where a statement competent against one defendant but incompetent against another is of such a prejudicial nature that no instruction can limit its effect to the party making it. **United States v. Haupt**, supra; **Hale v. United States**, supra; **People v. Feolo**, supra; **Flamme v. State**, 171 Wis. 501, 177 N. W. 596, 598; **People v. Sweetin**, 325 Ill. 245, 156 N. E. 354, 357.

Considering the nature of Matthews' statement, the cautionary instructions of the trial court constituted a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's" (54 F. 2d 1007).

It is not necessary, however, to decide whether cautionary instructions could have limited the effect of this statement to Matthews so that its admission would not be prejudicial to petitioner. The Court nullified these instructions by telling the jury that the statement "**corroborated certainly to some extent the statements of Sparks and Neal**" (R. 514, 515). Sparks and Neal were the principal witnesses for the prosecution, their credibility was a vital issue, their testimony alone connected petitioner with the crimes charged in the indictment. At most, the evidence, independent of the testimony of the

accomplices, established that petitioner was familiar with the method of handling checks at the Fisher-Memphis Aircraft Division and may have had an opportunity to remove the checks but the same evidence established that others had the same knowledge and equal, or greater, opportunity to have removed the checks from the files of the Fisher Company, and evidence of this character does not incriminate petitioner. **Gardner v. State**, 196 P. 750, 27 Wyo. 316, 15 A. L. R. 1040; **People v. Brooks**, 166 N. E. 35, 334 Ill. 549.

To constitute corroboration, the independent evidence must establish the participation of the accused in the crime charged or furnish a reasonable ground for finding by the jury that the accomplice was telling the truth. **People v. Reddy**, 185 N. E. 705, 261 N. Y. 479, 87 A. L. R. 763, 767; **Wharton's Criminal Evidence**, 10th Ed., Vol. I, Sec. 442, pp. 929-931.[4]

The instruction heretofore quoted, in which the Court authorized the jury to consider the statement of Matthews as corroborative of the testimony of Sparks and Neal, not only nullified the cautionary instructions (**Pharr v. United States**, 6th Cir., 48 F. 2d 767) but plainly violated the confrontation clause of the Sixth Amendment to the Federal Constitution (**Motes v. United States**, 178 U. S. 458, 44 L. Ed. 1150). "This error makes inadmissible any argument" that the statement of Matthews could not have been weighed by the jury against petitioner. People v. Feolo, supra. Considering actualities, Matthews was the principal witness against petitioner and his statement so impressed the jury that they wanted to read it during their deliberation. It would be speculation run wild to assume

[4] "It is not sufficient to corroborate an accomplice as to facts of the case generally. He should be corroborated as to some material fact which tends to prove that the accused was connected with the crime charged. The corroboration that merely raises a suspicion of guilt, because the accused had an opportunity to commit the offense, is not sufficient" (Wharton's Criminal Evidence, Sec. 442, supra).

that the jurors were only interested in this statement as it affected Matthews.

Petitioner proved an excellent service record as an employee of the Fisher Company (R. 137), and a good reputation for honesty, integrity, truth and veracity (R. 96, 98, 101, 129).

II.

The Verdict of Guilt Rests Solely Upon the Uncorroborated Testimony of Lonnie Neal and James Edward Sparks and There Were Circumstances, Apart From the Fact That They Were Accomplices, Which so Discredit Their Testimony as to Require Corroboration in Order That It May Support a Conviction.

At common law, and this is the rule in the Federal Courts, the jury may convict upon the unsupported testimony of an accomplice. **Camenetti v. United States,** 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442. **But the rule is subject to certain limitations. Sykes v. United States,** 8th Cir., 204 F. 909, 913; **State v. Armijo,** 35 N. M. 533, 2 Pac. 2d 1075, 1080; **People v. Alward,** 354 Ill. 357, 188 N. E. 425, 427; **People v. Hudson,** 341 Ill. 187, 173 N. E. 278, 280; **Abele v. State,** 138 Miss. 772, 103 So. 370; **Creed v. State,** 179 Miss. 700, 176 So. 596; **Jahnke v. State,** 68 Neb. 154, 104 N. W. 154; **State v. Concannon,** 25 Wash. 327, 65 Pac. 534; **Hill v. State,** 55 Tex. Cr. R. 435, 117 S. W. 134.

"Corroboration may be necessary where there are circumstances, apart from the fact that the witness is an accomplice, which tend to throw suspicion on his testimony as where the testimony is contradictory or inconsistent in itself; where it is directly contradicted by other witnesses; where it is so weak as not to be believable; where the accomplice has been impeached; or where it appears that a witness has sworn falsely as to a material matter."[5]

5 The language quoted is from 22 C. J. S., Sec. 810, p. 1391.

In Sykes v. United States, supra, the Court said:

"It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.' Holmgren v. United States, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 461, 19 Ann. Cas. 778). And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it represents no substantial evidence of it. Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158."

In State v. Armijo, supra, the Court, sustaining a petition for a rehearing (2 Pac. 1080), said:

"The inherent improbability of Gentry's story we think turns the scales against its substantiality; its sufficiency to support the verdict. If it were consistent and had the ring or any stamp of truth, established principles of review might perhaps compel us to accept it, though it comes from the lips of a witness interested as someone's accomplice; interested in the result to himself and to others; actuated by fear of vengeance; a confessed perjurer; uncorroborated by word or circumstance. It taxes the detached judicial attitude to accept any testimony from such a source. But when the evidence itself is incredible,

and in parts plainly fabricated, and, as a whole, convinces the mind that the truth is still suppressed, the point is reached, as it seems to us, where an appellate court should intervene. The verdict rests upon evidence which fails to meet any test of truth. We consider it unsubstantial."

In Creed v. State, supra, the Court said:

"The rule is well settled that, while a conviction may be sustained on the uncorroborated testimony of an accomplice, it is equally well settled that such a conviction should not be upheld where such testimony is improbable, self-contradictory, and unreasonable on its face, and especially where it is impeached by unimpeached witnesses" (176 So. 597).

This Court has not passed upon the precise question presented by the limitation or exception to the rule, but the decisions in Valdez v. United States, 244 U. S. 432, 61 L. Ed. 1242, and Holmgren v. United States, 217 U. S. 509, 54 L. Ed. 861, indicate that the limitation of the rule, recognized and applied in the cases cited, would be followed by this Court in a proper case.

Matters relied on to bring petitioner's case within the limitations of the rule under consideration include:

(1) The evidence affirmatively establishes that petitioner was not present at Sardis, Mississippi, on the date the accomplices, Neal and James Edward Sparks, testified that he delivered the checks to one or the other of them there. One of them placed the hour of delivery at 1 p. m. and the other at 3 p. m. (R. 200, 240). Neither designated the date, but it was stipulated that the checks were deposited in Alabama banks on Monday, January 14, and Tuesday, January 15, 1946 (R. 281-285). The checks were transported by Neal and James Edward Sparks from

Greenwood, Mississippi, to Guntersville, Alabama, on Sunday preceding the first deposit of some of the checks on Monday, January 14 (R. 250, 252, 258, 322). Neal testified that the checks were taken by him and James Edward Sparks from Greenwood to Guntersville the **second day after the delivery** thereof in Sardis; that they left Greenwood early in the morning and arrived in Guntersville about 8 o'clock at night (R. 162). This fixes the claimed date of the delivery of the checks in Sardis as Friday, January 11, 1946. That date is also fixed by the testimony of James Edward Sparks (R. 299, 300). At the time of the claimed delivery of the checks to Neal or Sparks (each claims the checks were delivered to the other and not in his presence), petitioner was at work at the Fisher plant in Memphis, this being shown by the attendance record of the plant kept and proven by Government witnesses (R. 135-142). Although Neal positively testified that the checks were not delivered on a Saturday (R. 201), petitioner established by undisputed evidence that he was not in Sardis on the Saturday afternoon before the checks were taken by Neal and Sparks to Alabama on Sunday (R. 495, 496). Other evidence also established that petitioner was not in Sardis on either Friday or Saturday afternoon preceding the transportation of the checks to Alabama on Sunday (R. 431, 432, 434, 435, 438, 439), and petitioner so testified (R. 458-462).

(2) James Edward Sparks, who signed the names of the payees to the checks involved, admitted that he perjured himself as a Government witness in the removal proceedings at Memphis, so doing in an effort to protect Neal (R. 318). The testimony of each is inconsistent in itself and they directly contradict each other on so many material points that wilful perjury is the only explanation of these contradictions.

Neal testified that when he and James Edward Sparks first met petitioner, the latter was masquerading under the name of Wilkinson (R. 147, 148). This was directly contradicted by James Edward Sparks (R. 237, 238).

Neal testified the checks were not delivered to him, that he remained inside a cafe when petitioner and James Edward Sparks went outside to the automobile of petitioner, that James Edward Sparks had the checks in a "paper sack" when he and Sparks left and he was informed by the latter that petitioner had given him the checks while they were together at the car (R. 157, 230). Sparks testified that the checks were not in a "paper sack," but in envelopes held together by a rubber band, that the checks were given to Neal and not to the witness, and that he did not receive them until they reached Greenwood (R. 244, 246, 298, 299).

According to Neal, 10% of the proceeds of the checks was to be deducted for the parties cashing them and the balance divided three ways, namely, one-third to Neal and James Edward Sparks, one-third to petitioner and one-third to "Statler's (petitioner's) boss" (R. 153, 154). James Edward Sparks testified that no such agreement was made, but that he and Neal were to get 50% of the proceeds, 10% was to be deducted for expenses, and petitioner and Matthews were to get 40% (R. 296, 297).

Neal testified that he only received $700.00 of the proceeds of the checks (R. 184). James Edwards Sparks testified that $6700.00 of the proceeds were turned over to Neal and that the latter gave him $3000.00 of this amount, retaining the balance (R. 275). **All of them agreed that no part of the proceeds of the checks was paid either to the petitioner or to Matthews** (R. 275, 345, 346). Inconsistencies and contradictions in the testimony of these two

witnesses, and impeachments thereof by unimpeached witnesses, might be multiplied but these are deemed sufficient to establish the bald perjury that is obvious in the testimony of both Neal and James Edward Sparks.

III.

The Purpose to Prejudice the Jury Against Petitioner Under the Cloak of Immunity Afforded by Cautionary Instructions Is the Only Logical Explanation of the Introduction and Use of Matthews' Statement, and Having Been Introduced and Used for That Purpose the Government Should Not Be Heard to Say It Did Not Have the Intended Effect.

Matthews testified orally for the government before the grand jury. He testified at the trial through a statement previously made to a federal investigator that was equivalent to a deposition against petitioner. It would be an impeachment of the legal learning of the Government Attorney to say that he did not know the inevitable prejudice to petitioner from reading that statement to the jury, but the Government Attorney, seeking immunity from the prejudicial consequences of its introduction, stated when it was offered in evidence that it was only introduced against Matthews. If that was the purpose, why should it not have been deleted of all references to petitioner?

The answer is obvious. It was intended to prejudice the jury against petitioner, and having introduced it for that purpose, as it contained matters incriminating petitioner, the Government should not now be heard to say that it did not have the intended effect. **Coulston v. U. S.**, 10th Cir., 51 F. 2d 178, 182; **Pierce v. U. S.**, 86 F. 2d 949; **Little v. U. S.**, 8th Cir., 93 F. 2d 401, 408.

In many cases, involving the introduction of evidence competent against one or more persons on trial but incom-

petent as to others, the rights of the accused may be safeguarded by appropriate instructions. But whether this can be done depends in a particular case upon its own facts and circumstances. But to hold that the right of petitioner to a fair trial was or could have been safeguarded by any instruction against the prejudicial consequences of Matthews' statement is to take entirely too narrow a view of the due process requirement as it protects the accused against unfair acts on the part of overzealous prosecutors. **Mooney v. Holohan**, 294 U. S. 103-112, 113; **Berger v. U. S.**, 295 U. S. 78.

CONCLUSIONS.

To be classified as "substantial," the evidence must be competent, credible and such as a reasonable mind might accept as adequate to support a conclusion (**Edison Company v. National Labor Relations Board**, 305 U. S. 197, 229), and this is particularly true in criminal cases (**State v. Gregory**, 339 Mo. 133, 96 S. W. 2d 47, 52, 53).

Measured by the test above stated, the evidence of Lonnie Neal and James Edward Sparks does not constitute substantial evidence fairly tending to sustain the verdict. Consequently, petitioner's motion for a judgment of acquittal, made at the conclusion of all the evidence (R. 501), should have been sustained (**Abrams v. United States**, 250 U. S. 616, 619; **Mortensen v. United States**, 322 U. S. 369, 374).

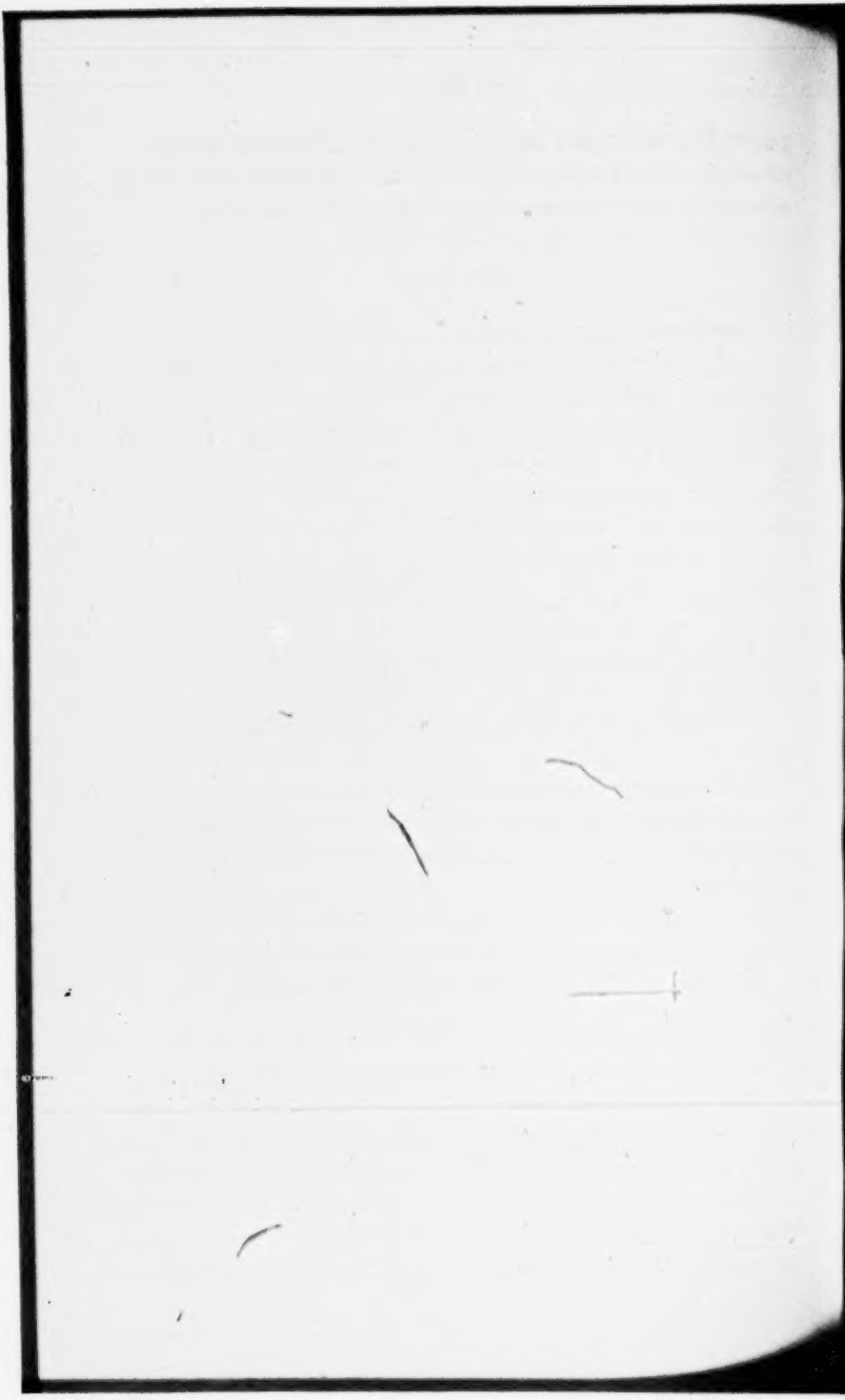
As we conceive the record, petitioner was convicted without substantial evidence of guilt and in violation of the fundamental right of a fair trial according to the law and the evidence. But be that as it may, the per curiam opinion of the Circuit Court of Appeals in the face of the record does not indicate the character of review contemplated by the decisions of this Court in **Maryland Casualty Company v. Jones**, 279 U. S. 702, 73 L. Ed. 960, and **Loner-**

gan v. United States, 303 U. S. 33, 82 L. Ed. 630, and petitioner invokes the supervisory power of this Court for a correction of the errors committed by the trial court.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case entitled on its docket Austin Miller Statler, Jr., and Thomas Jackson Matthews versus United States of America, No. 11,886, to the end that said case may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code (U. S. C. A., Title 18, Sec. 47), and the applicable rules promulgated by this Court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

L. E. GWINN,
Counsel for Petitioner.



APPENDIX.

Statement of Thomas Jackson Matthews.

Matthews' statement was introduced in evidence over the objection and exception of petitioner (R. 392). This statement, read to the Jury by the F. B. I. Agent who obtained it, is as follows:

"The Witness: Birmingham, Alabama, March 20, 1946. I, Thomas Jackson Matthews, do make the following voluntary statement to William Taylor Hardy and John D. Pope, who have identified themselves to me as being Agents of the Federal Bureau of Investigation. I am making this statement voluntarily because it is true and I have not been threatened or promised anything in giving this statement.

I was born at Benton, Arkansas, January 21, 1917 I have lived in Memphis since June, 1942, and my present address is 380 N. Claybrook St., Apt. 22, Memphis, Tennessee.

In June, 1942, I was employed by the Memphis Fisher Aircraft Div. plant on N. Second Street in Memphis. While I was employed there I met Austin Statler who was also employed at the above company. He worked in the payroll office there. I quit the above company in August of 1944 to run a cafe at 12 Mississippi St. in Memphis. After I left the Memphis Fisher Aircraft Division I did not run around with Statler any more and I don't recall that I saw him until the last of Dec. of 1945. As I recall it was after Christmas. He came to my home at 380 N. Claybrook St. and talked about my helping him get some connections in the whiskey racket. Two or three days later he came back and said that many employees at Fisher Co. had retroactive pay checks

coming to them and had not made demand on the company within the required time. Statler explained that if I could go around and contact the payees of these checks and make a deal with them I could make some money. He wanted me to make a deal with the people so that I would get them to split the money up which they would receive and I could get the checks through him. I declined to do this. The next day or so Statler again contacted me and asked if some of my contacts which I had made in the liquor business would handle the checks. I told him I thought I did.

I don't recall when we went but I believe that it was the same night. We went to Marks, Miss., in Statler's car to Lonnie Neal's place there. This place is west of Marks 4-5 miles. We saw Lonnie Neal, James Sparks and Cliff Pearson who worked for Lonnie Neal for a long time. There was some other man there from Pontotoc, Miss., who was waiting for a load of liquor to come in from Louisiana. I had known Lonnie Neal about one year through former contacts. I hauled some whiskey for Neal. I had also seen Cliff before at this place and knew that he worked for Neal. I introduced Statler to Neal and they went back in the back of the place to talk. There was also some woman there who was with Neal. She was from Okolona, Miss., and was a bootlegger's wife from there as I recall. I saw Statler hand Neal an envelope and Statler later told me that the envelope which he had given Neal contained one of the checks. I had never seen James Sparks before but Lonnie introduced us. This man from Pontotoc was driving a 1946 or 1942 light blue color Ford 2-door car with a spotlight on it. I could identify this man if I saw him again. After Statler and Neal had finished talking they came up to the front of the place where we

were. Statler and I then left and returned to Memphis. This was 10:30 or 11:00 P. M. but I can't recall the exact date. On the drive back to Memphis Statler told me what he had given Neal. James Sparks was not in on the conversation at Neal's place. Statler and Neal were alone during their entire discussion.

During the first of January, 1946, Statler contacted me and wanted me to contact Neal and tell him to meet us at Sardis, Miss. I called Neal and he said he would meet us at the 51 Grill at Sardis. I talked only to Lonnie Neal at this time. We went to Sardis, leaving Memphis around noon that day, and met Neal, James Sparks and some Negro. The Negro was sitting in the front seat between Neal and Sparks. Statler and I waited at the Grill for about an hour before the others came. We ate dinner there and had several bottles of beer. When they arrived Lonnie and James Sparks came into the Grill and the Negro stayed in the car. We then went outside to have a drink. Statler went around to the back of his car, 1940 Dodge coupe, light gray in color. He raised the trunk cover on his car and took out a package of envelopes with a rubber band or string around them. He then went back and sat in his own car. Neal also got in Statler's car. Sparks and I sat in Neal's car, a light blue 1941 Ford, and had a drink of whiskey and waited until Statler and Neal finished talking. They talked for a few minutes and Statler and I started back to Memphis. On the way he told me that he had given Neal the checks. He mentioned at some time that the checks amounted to around $10,000. I don't recall when he told me this. On the way back to Memphis Statler stopped the car on a side road near Senatobia, Miss. He got out and burned the envelopes in which the checks had been,

the letter explained what the checks were for, and the stub which showed deductions, etc. After he had burned these papers he got back in the car and said, 'All I have to do now is wait for the money to come in.' We then returned to Memphis. About a week or ten days later Statler picked me up and told me he hadn't been able to find Lonnie and wanted me to go to Greenwood, Miss., to help him find Neal to get his money. I had been selling Lonnie whiskey and that was the reason I had accompanied Statler. We went to the Crystal Grill in Greenwood, also the Hamburger Cafe, attempting to locate Neal. We didn't find Neal. Statler returned to Memphis that night but told me to stay over and see if I could collect his money from Neal. I stayed at a hotel facing the R. R. track in Greenwood and went the next day to the Crystal Grill Cafe to have breakfast. While I was there James Sparks, two girls, and another man came in. He was red headed and looked something like James. James introduced him to me as being his brother. I had eaten but I drank coffee with them and told James that I wanted to see Lonnie. He left and came back to the cafe. We, James, his brother, the two girls and I, went out to some tourist cabin in the edge of Greenwood where James stayed and Lonnie Neal came there later. When Lonnie came I told him that Statler had sent me to see him. Lonnie said, 'I can't tell you anything now but tell Statler we'll be up there tomorrow or the next day.' When I got ready to go James' brother was getting ready to go back to Alabama. I asked him if I could ride part way with him. He agreed and I rode with him to Pontotoc, Miss. On the way I talked to Sparks about the checks. I asked Sparks if everything had gone all right over in Alabama. He told me he had cashed the checks and had

carried $8,200 to Lonnie Neal. He said he kept either 2800 or 3800 dollars. He also said that Lonnie gave James $800. He said he gave the money to Lonnie Neal the night before. I got out at Pontotoc and got in a car with another man and rode to Memphis. I saw Statler at my house and told him what I had found out. He then said, 'I don't know how I'm going to pay Bojo off.' I know that the individual that he was referring to was the head paymaster at the Memphis Fisher Aircraft Div. of General Motors. I didn't ask him any more about Bojo. He later told me that if he was picked up that he, Statler and Bojo, would get me out.

I should like to point out that the two girls who were in Greenwood returned with Ferrell Sparks to Alabama.

I have read the statement and it is correct. Thos. J. Matthews.

William Taylor Hardy, Special Agent FBI, Birmingham, Ala., John D. Pope, Jr., Special Agent FBI, Birmingham, Ala.,'' witnesses (R. 393-397).

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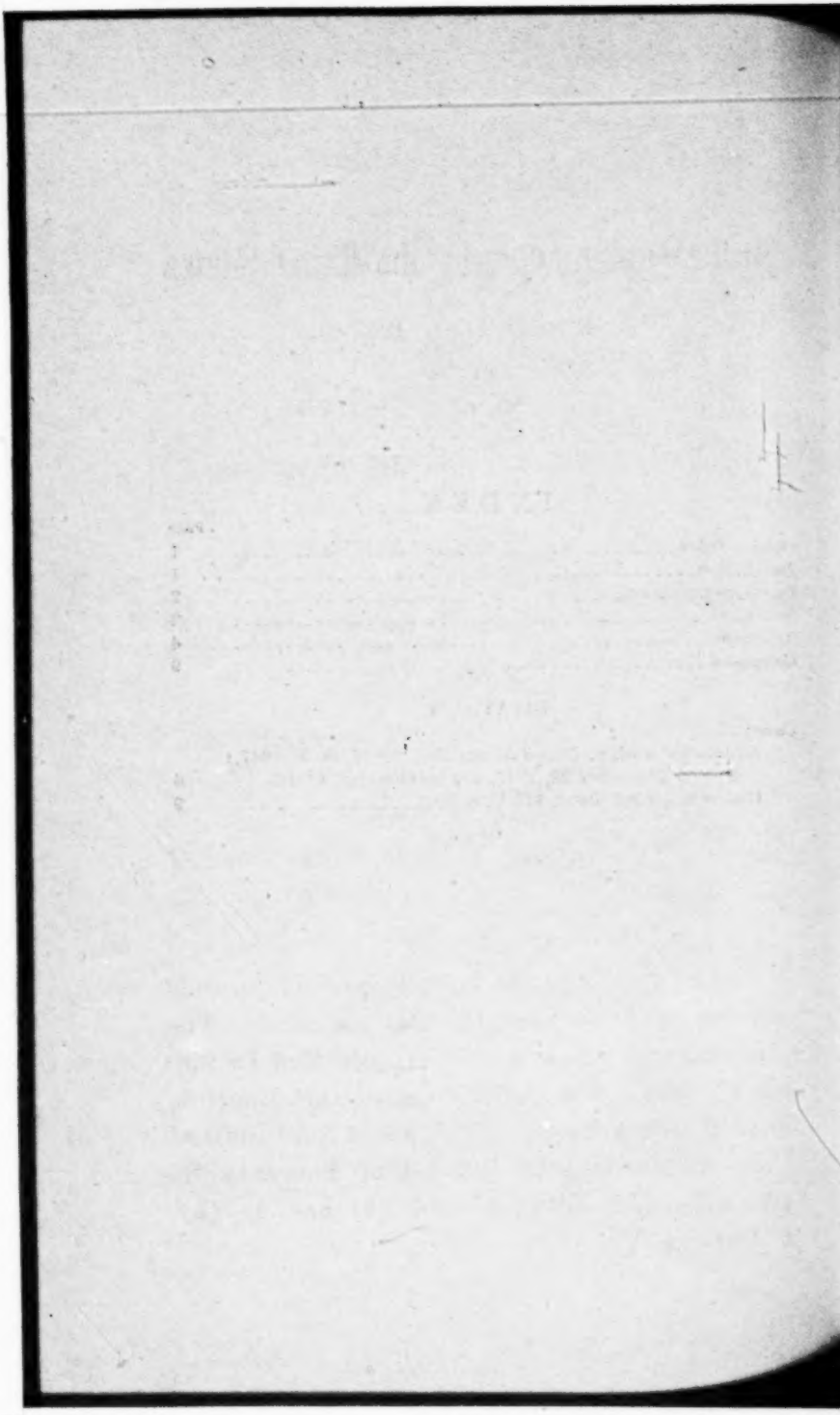

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 479

AUSTIN MILLER STATLER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 585) has not been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 18, 1947 (R. 585). The petition for a writ of certiorari was filed December 15, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

Whether the trial court committed reversible error:

1. in refusing to grant petitioner a trial separate from that of his coconspirator and accomplice; and

2. in denying petitioner's motion for a judgment of acquittal, on the contention that the only substantial evidence of guilt was the testimony of coconspirators, whose testimony allegedly was discredited.

STATEMENT

Petitioner and five other persons (Thomas Jackson Matthews, Buster Sparks, Julian Ferrell Sparks, James Edward Sparks, and Claude Lonnie Neal) were indicted for conspiracy to violate the National Stolen Property Act[1] (R. 2–18). Petitioner and three of the other defendants (Matthews, Neal, and James Edward Sparks) were also jointly indicted in two counts of the same indictment for substantive violations of the act[2] (R. 19). All the defendants except petitioner and Matthews pleaded guilty (R. 144, 233, 361, 502). They were convicted on all three counts after a joint trial (R. 31–32), and petitioner was sentenced generally to five years' imprisonment (R. 32–33). On appeal by Matthews and petitioner, the circuit court of appeals af-

[1] 18 U. S. C. 418a.
[2] 18 U. S. C. 415.

firmed the conviction as to both defendants (R. 585), holding in a *per curiam* opinion (*ibid.*) that there was abundant evidence to support the verdict and no reversible error shown by the record.

At the outset of the trial, petitioner moved for a severance on the ground that introduction in evidence of statements made to F. B. I. agents by his codefendants would be prejudicial, particularly if such statements did not refer to the fact, where it was a fact, that the maker of the statement had a previous criminal record (R. 21–22). The motion was overruled (R. 23). In the course of the trial, all the codefendants who had pleaded guilty appeared as witnesses for the Government (R. 144, 233, 322, 361). Matthews did not take the stand. A statement made to an F. B. I. agent by Matthews after his arrest was read to the jury (R. 393–397), with the usual cautionary instructions by the court (R. 391, 392, 398, 515; see pp. 4–6, *infra*), but the statement itself was not admitted in evidence (R. 398, 554–555).

At the close of the evidence, defendants moved for a judgment of acquittal on the ground that there was no substantial evidence of guilt and that "all the substantial evidence is as consistent with innocence as with guilt" (R. 30, 501).

After verdict, petitioner moved for a new trial (R. 564–567). One of the grounds of the motion

was alleged prejudice to petitioner arising from the reading of Matthews' statement without his taking the stand so that petitioner, through cross-examination, might show that Matthews had testified for the Government before the grand jury and that he had a previous criminal record. The motion for a new trial was overruled (R. 568).

ARGUMENT

1. Petitioner's contention that it was error to deny him a separate trial is based upon the action of the trial court in permitting the reading of Matthews' pretrial statement to the jury (Pet. 11–16). The record shows, however, that petitioner's rights in connection with the reading of this statement were fully protected. In introducing the statement, government counsel said (R. 390):

> If it please the Court, I want to introduce at this time the statement of this man, of Thomas Jackson Matthews, and I want to ask that the Jury be instructed this statement is to be limited in its effect as against the subject Matthews.

Before the statement was read, the court said (R. 391):

> Now, gentlemen of the Jury, this statement is being received in this case as evidence against the Defendant Matthews. It is not evidence against the Defendant Statler. You will only consider it in the case insofar as the Defendant Matthews is concerned.

And again, when petitioner objected to the reading of any part of the Matthews statement containing a reference to petitioner, the court said (R. 392):

> I have already told you, gentlemen, now this statement is made by the Defendant Matthews, and it was made after these parties had been arrested, and after any conspiracy would be over. The conspiracy would be at an end at that time, and this statement would not be binding on the Defendant Statler, and is not to be considered under any circumstances by you as any evidence against the Defendant Statler. Whatever is in this statement is only evidence as against the Defendant Matthews.

After the statement was read the court again said (R. 398):

> Now, gentlemen, I want to caution you again about that statement. That statement is only evidence as against Matthews. It is shown here that it was taken from him in his own attorney's office. It is not evidence against the Defendant Statler, and is not to be considered against him at all in any way in this case, and is no evidence to connect Statler with any of these transactions.

In its charge to the jury, the court first discussed the evidence in connection with defendant Matthews (R. 514–515). In summarizing Matthews' statement to the F. B. I. agents, the court refrained from referring to any mention

of petitioner therein (R. 515). Immediately upon completing his summary of the evidence relating to Matthews, the court said (R. 515):

> In connection with that statement of Matthews, I want to caution you again, gentlemen of the Jury, that that statement was received as evidence only against the Defendant Matthews. That statement was taken after these parties had been arrested, and after the conspiracy, if there was a conspiracy, was at an end, and anything in that statement as to the Defendant Statler would be hearsay and is not admissible in this case against Statler, and is under no circumstances to be considered by you as any evidence against Statler in this case.[3]

Under the recent decision of this Court in *Blumenthal et al.* v. *United States,* Nos. 54–57, O. T. 1947, decided December 22, 1947, slip opinion, pp. 10–13, it is clear that the cautionary instructions of the court were sufficient to protect petitioner from any prejudice arising from the reading of the Matthews statement. Only petitioner and Matthews were on trial; the statement was competent against the coconspirator Matthews; and there is no contention that the testi-

[3] The court's statement, referred to by petitioner (Pet. 14–15), that the Matthews statement "corroborated certainly to some extent the statements of Sparks and Neal" preceded the portion of the charge quoted, and was made directly in the course of his review of the evidence concerning Matthews.

mony against petitioner, if believed by the jury, was not sufficient to support the verdict.

The only reason advanced by petitioner for the granting of a separate trial was the possibility of the Government's introducing statements by coconspirators without petitioner's having an opportunity to confront and impeach the credibility of the makers thereof. Since the only such statement presented was carefully kept from the jury in connection with the case against petitioner, there obviously was no abuse of discretion by the court in overruling petitioner's motions for severance and for a new trial.

2. Petitioner contends that there was no substantial evidence of his guilt. He asserts that the only evidence was "uncorroborated testimony of Lonnie Neal and James Edward Sparks," co-defendants and accomplices of petitioner, and that such testimony was so discredited "as to require corroboration in order that it may support a conviction" (Pet. 16–21).

Petitioner does not dispute the established principle of law that a conviction may be based upon uncorroborated testimony of accomplices (Pet. 16). In charging the jury, the trial court said (R. 522–524):

> As I say, you have the right to consider the interest of all the witnesses. You have a right to consider the interest of the Defendant in the case. There is testimony here by James Edward Sparks,

Claude Lonnie Neal, Julian Ferrell Sparks, and Buster Sparks. All of those witnesses are alleged to have been parties to the crimes which the Government charges here were committed, and they are accomplices. They were involved themselves in these transactions, and they have already plead guilty to them. And you have got a right to consider that fact, and it is your right and duty to receive evidence of an accomplice with caution and to scrutinize that testimony with care. It should be carefully scrutinized. You have got a right to examine all of the testimony to see whether or not the testimony of accomplices is corroborated in any material respect, but after you have considered it, scrutinize it carefully and with caution. * * * It is not necessary that the testimony of an accomplice be corroborated by testimony of other witnesses, provided as I say you believe that evidence, and believe it to be true, then you have a right to act upon it.

* * * * *

There is testimony here that some of these witnesses have been convicted of crimes involving moral turpitude. That testimony is permitted for you to consider. It goes to the credibility of the witness, and is to be considered by you in connection with the weight that you will give to the testimony of any witness that is shown to have been convicted of a felony or a crime involving moral turpitude. * * *

Counsel for petitioner did not object to the court's charge concerning the testimony of accomplices.[4] It is not claimed that the testimony of the accomplices, if believed by the jury, was insufficient to sustain the verdict. The credibility of witnesses is entirely within the province of the jury. *Glasser* v. *United States*, 315 U. S. 60, 80. In determining this question the jury had complete and accurate instructions.

Two courts have found that the evidence was sufficient to sustain the verdict of guilty, and, under the circumstances, even granting petitioner's basic contention that the only substantial evidence of his guilt was the uncorroborated testimony of his accomplices,[5] there is no occasion for further review by this Court.

CONCLUSION

The case was correctly decided below. There are no questions of importance or conflict of deci-

[4] Counsel expressly stated that "we have no exceptions to the charge" (R. 525). He merely called the court's attention to his failure to refer to one bit of evidence relating to petitioner's alibi. The court thereupon corrected this omission.

[5] The record shows that such evidence was not totally uncorroborated. For example, one of the means of identifying petitioner in the transaction testified to by several witnesses was the fact that he was driving a light gray 1940 Dodge coupe (R. 149, 238, 365, 433). Petitioner confirmed the description of his automobile (R. 470). Neal's testimony concerning petitioner's presence in Marks, Mississippi, on two occasions (R. 145–146, 149), was corroborated by Pearson, an independent witness (R. 363 ff.). Petitioner's knowledge of and access to the checks involved is shown throughout the record, including petitioner's own testimony (R. 450 ff.).

sions involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPHINE H. KLEIN,
Attorneys.

JANUARY 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

AUSTIN MILLER STATLER, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 479

PETITION FOR REHEARING

L. E. GWINN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

AUSTIN MILLER STATLER, JR., Petitioner,		
vs.		No. 479
UNITED STATES OF AMERICA, Respondent.		

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes the petitioner, Austin Miller Statler, Jr., and respectfully petitions the Court for a rehearing of his petition for certiorari, denied by this Court on February 2, 1948, and upon the following grounds, to-wit:

I.

This Court apparently overlooked the point of controlling importance in determining whether the joint trial of petitioner, resulting in the reading of a statement made by his co-defendant, Matthews, was a violation of rights guaranteed petitioner by the 5th and 6th Amendments to the Federal Constitution. This point was the coopera-

tion between Matthews and Government counsel under which his statement could be read to the jury under circumstances that precluded petitioner either from cross-examining Matthews or showing his previous conviction of infamous crimes. Matthews' statement, set out in full in the appendix to the petition for certiorari, was read in evidence over the objection and exception of petitioner (R. 392). That statement contained little or nothing which incriminated Matthews, and insofar as it was material to any issue at the trial, its incriminating matters were largely restricted to petitioner. From beginning to end, it was the equivalent of a deposition that Statler was primarily responsible for the crime charged in the indictment (R. 393, 397). No cautionary instructions could possibly have removed from the minds of the jurors the prejudice to petitioner resulting from the reading of this statement.[1]

However, it is not the futility of cautionary instructions but the failure of the Government to disclose the relationship of Matthews to the prosecution that presents the most cogent reason for a review of the case by this Court. Matthews' statement was taken by an FBI agent in the office of Matthews' attorney, and the agent came there at the request of the attorney (R. 397). Matthews' associates in certain criminal enterprises had plead guilty and testified as witnesses for the Government at the trial. Matthews had testified as a witness for the Government before the grand jury but did not testify at the trial. His defense was purely formal. His association in criminal enterprises with Neal and other witnesses for the Gov-

[1] Hale v. U. S., 8th Cir., 25 F. 2d 430, 438, 439; United States v. Haupt, 7th Cir., 136 F. 2nd 661, 673, 674; People v. Feolo, 282 N.Y. 276, 26 N.E. 2d 256, 258, 259; Flamme v. State, 171 Wis., 501, 177 N.W. 296, 298; People v. Sweetin, 325 Ill. 245, 156 N.E. 354, 357.

ernment, his testimony as a Government witness before the grand jury, the contents of his statement to the FBI agent, given in the office and in the presence of his attorney, and his previous criminal record, including two convictions for highway robbery (R. 568, 571), were known in advance of the trial to the Assistant United States Attorney who prosecuted the case (R. 527, 530; 568-571) but were not disclosed to the Court when the motion for a severance was made (R. 21-23).

When Matthews' statement was read to the jury, there had been no denial of the incriminating testimony against him and there was no reason to believe that he would testify in his own defense or refuse to testify as a Government witness if so requested by the United States Attorney. Therefore, the purpose to prejudice the jury against petitioner through the reading of this statement is the only explanation of its introduction in evidence, and the Government should not now be heard to say that the reading thereof did not have the intended effect.[2] Cautionary instruction should not be a cloak for such an invasion of fundamental rules of fairness.

There is another circumstance relating to Matthews which was inadvertently overlooked in the preparation of the petition for certiorari. He did not prosecute his appeal from the judgment of conviction, and thereafter was employed by the Government (R. 582, 583, 584). The extent of the cooperation between Government agents and Matthews and his attorney, the fact that there was no necessity for introducing the statement under discussion as against Matthews, and the highly prejudicial char-

[2] Coulson v. U.S., 10th Cir., 51 F. 2d 178, 182; Pierce v. U.S., 86 F. 2d 949, 953; Little v. U.S., 8th Cir., 93 F. 2nd 401, 408.

acter thereof as it related to petitioner are clearly sufficient to bring this case within the scope of the principle applied by this Court in Mooney v. Holohan, 294 U.S. 103 and Berger v. U. S.; 295 U.S. 78, which protects the accused against unfair acts on the part of public prosecutors.

Any possibility that the jury could perform the "mental gymnastics" (54 F. 2d 1007) necessary in following the Court's instruction to disregard this statement as against petitioner was removed by the assertion in the Court's charge that Matthews' statement "*corroborated certainly to some extent the statements of Sparks and Neal.*" (R. 514, 515). In a footnote, at page 6 of the brief for the United States in opposition to the petition for certiorari, it is said that the Court's statement under consideration was made in the course of his review of the evidence concerning Matthews. But that is entirely immaterial. Any individual who could consider this statement as positive corroboration of the testimony of two witnesses as it affected one party and as entirely negative as it affected another party involved in the same transaction would be a genius, not an ordinary juror.

This is not the case of a joint trial of two defendants, each making a bona fide defense, but the trial of petitioner with a nominal codefendant who was to all intents and purposes a Government witness who testified far more effectively against petitioner through his statement than he could have done as a witness subject to cross examination and to impeachmnet by the record of his prior convictions.

Considering substance, not form, we think it clear that the reading of this statement to the jury violated the con-

frontation clause of the Sixth Amendment to the Federal Constitution. Motes v. U. S., 178 U.S. 458; Kirby v. U. S., 174 U.S. 47, 59.

In the Kirby case, involving an indictment for receiving stolen property, it was held that the judgment of conviction against the principal felon could not be received in evidence on the trial of the person charged with receiving the stolen property. The court held that the introduction of this record in evidence was a violation of the Sixth Amendment, which provides that in "all criminal prosecutions the accused shall . . . be confronted with the witnesses against him." One of the grounds on which the court predicated this conclusion was the fact that the alleged receiver of the stolen porperty, if present at the trial of the party convicted for stealing it, would not have been permitted to examine the thieves "upon their pleas of guilty, nor cross-examine witnesses in that case." (See page 53 of the opinion.)

In the brief of the United States in opposition to the petition (p. 6), reference is made to the case of Blumenthal, et al, v. U. S., decided by this Court December 22, 1947, as sustaining its contention that the cautionary instructions of the Court in the instant case were sufficient to protect petitioner from any prejudice arising from the reading of the Matthews' statement. An entirely different situation, however, is presented by the record in that case and the record in the instant case. In the Blumenthal case, all the defendants were making a real defense and there was a substantial reason for introducing the statement against the party that made it. Such is not the situation here where one of the defendants had testified as a Government witness before the grand jury and after the trial was employed by the Government. (R. 584).

II.

At page 9 of the brief of the United States, opposing the petition for certiorari, it is insisted that the testimony of the so-called accomplices was not "totally uncorroborated". Such insistence is without merit. It is true, as there asserted, that petitioner owned a light gray 1940 Dodge coupe and that one Pearson, referred to as an "independent witness", so testified, but it is an abuse of language to call this employee of Neal an "independent witness". Petitioner owned a 1940 Dodge coupe, and the accomplices so testified, but this is not a "material fact" which tends to prove that the accused was connected with the crime charged, and, it is not, therefore, a corroborating fact or circumstance. (Wharton's Criminal Evidence, 10th Ed., sec. 442.)

Regardless of whether Pearson is considered an "independent" or a controlled witness, the testimony of Pearson with respect to the color and model of petitioner's car is one of the matters that is destructive of the probative value of his testimony. He claimed to have made his observation through a small window in the side of the liquor store where he worked for Neal and in the nighttime while the lights on the car were extinguished and there was no light on the premises except a small electric light on the front of the store and to have made this observation while busy waiting on customers inside the store (R. 372, 373).

If further evidence is needed to show that Pearson was not testifying to facts within his own knowledge but merely repeating what he was told to say, it will be found in his testimony that petitioner and Matthews brought a load of whisky to Marks, Mississippi, on the occasion he

claims they were there (R. 365). On cross examination he admitted that he did not see any whisky in their car or see either of them with whisky but predicated his conclusion on the fact that later in the night he discovered some whisky in his bedroom, at the rear of the store, which he did not see placed there or know how it got there (R. 370). Such testimony is intrinsically destitute of probative value in either a trial or an appellate court. [3]

It was the contention of the Government at the trial and in the Circuit Court of Appeals that the record discloses no motive why Neal and Sparks should have implicated petitioner unless he had been a guilty participant in the crime to which they confessed. "Proof of motive is never indispensable to conviction" (Pointer v. United States, 151 U. S. 376, 414), and there is no sound reason why a defendant should be required to prove a motive in order to destroy the probative value of the testimony of two thoroughly discredited accomplices, one of whom admitted that he had perjured himself in prior proceedings in the cause (R. 318).

However, the record suggests a motive for the implication of petitioner by Neal and Sparks, the latter an employee and associate of Neal in criminal enterprises. This motive was the shielding of some confederate at the Fisher plant. It appears without dispute in the record that Neal planned the procedure for handling the checks and controlled the disposition of the proceeds, in which it is admitted that petitoner did not share (R. 300, 345). Neal informed relatives of Sparks, who deposited the checks in Alabama banks, that he had a relative at the

[3] Edison Co v. National Labor Relations Board, 305 U.S. 197; Quock Ting v. United States, 140 U.S. 417.

Fisher plant and had gotten the checks from him (R. 164, 254). Neal did have a relative working there (R. 206, 207). It is inconceivable that he would have made this statement if he had obtained the checks from petitioner, whom he had no reason to shield at the time the statement was made to relatives of Sparks in Alabama.

Upon the considerations aforesaid and others appearing in the petition for certiorari and the record, petitioner respectfully prays that this Court re-consider the petition for certiorari and, upon such re-consideration, he prays that the petition for certiorari be granted as prayed in the petition, and petitioner prays for such other and further relief in the premises as to this Court may seem right and proper.

L. E. GWINN,
Counsel for Petitioner.

I, the undersigned attorney for petitioner, do hereby certify that the foregoing petition is presented in good faith and not for delay. I further certify that the petition for rehearing is restricted to the grounds specified in Rule 33, as amended, the first three paragraphs thereof relating to a point apparently overlooked in the consideration of the petition for certiorari, and being necessary to show the distinction between Blumenthal v. United States, decided by the Supreme Court December 22, 1947, relied on by the Government in its brief opposing certiorari, and not available to petitioner when the original petition was prepared, and the instant case.